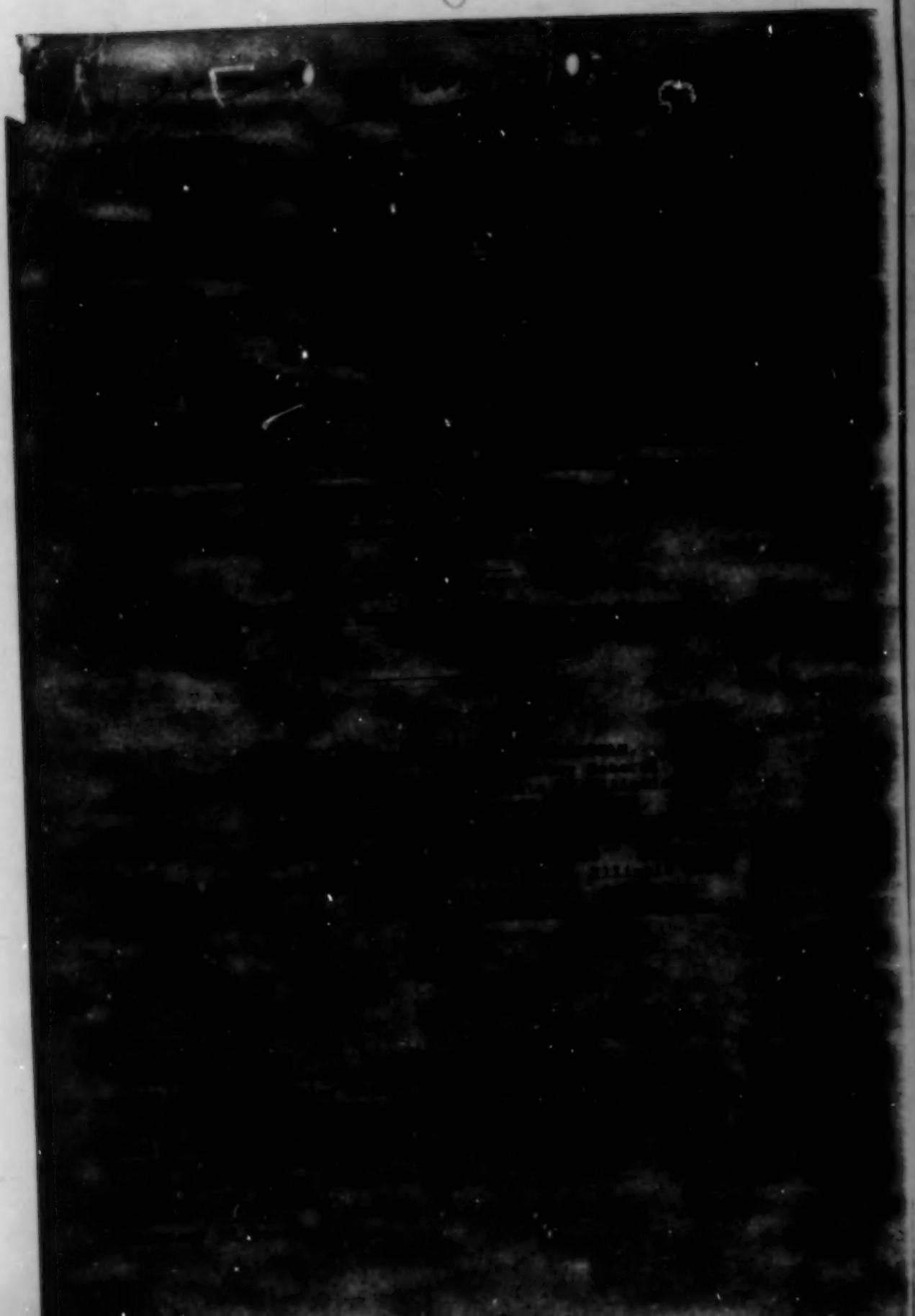

QUESTION PRESENTED FOR REVIEW

Whether petitioner's statements, previously suppressed on Fourth Amendment grounds, may be used to rebut the testimony of a defense witness other than the petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

DARRYL JAMES,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Illinois Supreme Court, affirming petitioner's circuit court convictions for murder and attempt murder and reversing the contrary judgment of the Illinois Appellate Court is reported at 123 Ill. 2d 523, 528 N.E.2d 423 (1988).

JURISDICTION

The jurisdictional requisites have been set forth in the Petition for Writ of Certiorari. However, the respondent believes that the petition has failed to show any good reason for this Court to exercise jurisdiction to review the judgment in question by writ of certiorari.

STATEMENT OF THE CASE

Petitioner Darryl James, was convicted of the murder of Gerilia Boyd and the attempt murder of Delbert Collins. The incident occurred on the night of August 30, 1982, in Chicago, Illinois, when petitioner and two companions demanded money from a group of eight boys.

At the pre-trial proceedings, the trial court granted petitioner's motion to suppress evidence stemming from the arrest. (R. 60) The petitioner was arrested at his mother's beauty shop, where police discovered petitioner sitting under a hair dryer with curlers in his hair. (R. 19,20) Among the evidence suppressed was petitioner's statements admitting he had changed his hair color from reddish-brown to black in order to change his appearance. (Supp. R. 95-96, 136-137) Petitoner's motion to suppress was granted on the grounds of lack of probable cause for arrest.

In their case-in-chief, the People presented the testimony of five eyewitnesses to the Boyd-Collins shooting: John Brown, Perry Brown, Kenneth Brown, Darryl Hall and Delbert Collins. According to the testimony of each of the five boys, they were walking home from a party on the night of August 30, 1982, when three boys approached them and demanded money. (R. 293, 339, 385-87, 407-8, 427-28) When no money was surrendered, one member of the trio pulled out a gun and shot into the group of boys. (R. 302) Witness John Brown described the shooter as 5 feet 4 inches tall, light-complexioned, wearing an earring and a dark brown baseball cap, and having long reddish-brown hair combed straight back. (R. 294, 300-01) The other four witnesses to the shooting corroborated John Brown's testimony. (R. 343, 391, 412, 430)

At trial each of the five eyewitnesses pointed to petitioner and identified him as the person who shot Gerilia Boyd and Delbert Collins. The witnesses stood firm in their identification despite their acknowledgement that petitioner's hair was black in color and natural in style at the time of trial, which was two years after the incident. Four of the witnesses testified that they had seen petitioner two weeks before the shooting incident at a parade and at that time petitioner's hair was long, red and slicked back. (R. 294-5, 340, 388-9, 408, 429)

The petitioner's primary witness and close family friend, Ms. Jewel Henderson, testified in direct contradiction to the testimony of the five prosecution eyewitnesses. She testified that she had never seen petitioner wear a cap or an earring. Ms. Henderson further testified that petitioner did not have red hair on August 30, 1982. (R. 500-04) The petitioner chose not to testify.

In rebuttal, the People sought to introduce petitioner's statements to police that shortly after the shooting on August 30th, petitioner had changed his hair color from reddish-brown to black. (Supp. R. 62) Petitioner's counsel objected to the use of the statements on the grounds that they had been suppressed because of Fourth Amendment violations. (Supp. R. 63-4) Nonetheless, the court allowed the use of petitioner's statements to rebut or refute Ms. Henderson's testimony that petitioner had black hair, not red, on the night of the shooting. (R. 64) Petitioner's counsel then moved to suppress petitioner's statements on the grounds that the statements were involuntary. (Supp. R. 115) The trial court suspended the trial, held a hearing on the motion, and then denied petitioner's motion, finding that petitioner's statements

were voluntary. (Supp. R. 128) Defendant's statements that on August 30, 1982 his hair was reddish-brown, long and combed straight back were presented to the jury. A police officer testified that defendant had admitted that he had changed his hairstyle and hair color in order to change his appearance. (Supp. R. 136-137) After petitioner's counsel cross-examined the officer, the trial court orally instructed the jury that petitioner's statements about his red hair were offered solely to refute and rebut his own witness' testimony. (Supp. R. 145)

In surrebuttal, two relatives of petitioner testified that petitioner's only hair color had been black. (Supp. R. 148-154) The jury then deliberated and found petitioner guilty of the murder of Gerilia Boyd and guilty of the attempt murder and aggravated battery of Delbert Collins. (Supp. R. 250)

Petitioner appealed his convictions to the Illinois Appellate Court, which reversed the convictions and remanded the case for a new trial. The appellate court held that the admission of petitioner's suppressed statement to rebut the testimony of a witness other than petitioner was improper. The court reasoned that the exclusionary rule would be "swallowed up" by the exceptions, if it were to uphold the trial court's actions.

The Illinois Supreme Court reversed the appellate court decision by holding that when the direct testimony of a defense witness "squarely contradicts" suppressed evidence, then the suppressed evidence may be admitted to rebut the testimony of that witness. In so holding the Illinois court relied on the legal principles espoused by this Court in Walder v. United States, 347 U.S. 62, 98 L.Ed 503, 74 S.Ct. 354 (1954); Harris v. New York, 401 S. 222, 28 L.Ed 2d 1, 91 S.Ct. 643 (1971); and United States v. Havens, 446 U.S. 620, 64 L.Ed2d 539, 100 S.Ct.

1912 (1980), which the Illinois court had previously applied in People v. Payne, 98 Ill. 2d 45 (1983). The state supreme court then affirmed petitioner's convictions for murder and attempt murder and later denied petitioner's request for rehearing.

REASON FOR DENYING THE WRIT

THE TRIAL COURT PROPERLY ADMITTED PETITIONER'S SUPPRESSED STATEMENTS TO CHALLENGE AND CONTRADICT THE DIRECT EXAMINATION TESTIMONY OF PETITIONER'S OWN WITNESS WHERE THAT TESTIMONY DIRECTLY CONTRADICTED PETITIONER'S SUPPRESSED STATEMENTS AND PETITIONER DID NOT TESTIFY; AND THUS PREVENTED PETITIONER FROM ABUSING THE EXCLUSIONARY RULE BY USING IT AS A SHIELD FOR KNOWING PERJURY.

Petitioner contends that the Illinois Supreme Court improperly expanded the impeachment exception to the exclusionary rule to include the use of a defendant's suppressed statements to rebut the testimony of a defense witness where a defendant does not testify. Petitioner argues that the state court's ruling does not comport with this Court's decisions concerning exceptions to the exclusionary rule.

At petitioner's trial for murder and attempt murder, five prosecution eyewitnesses to the crime described the offender as having reddish-brown, slicked back hair. Their in-court identifications of defendant as the offender were positive, despite the difference in color, length and style of petitioner's hair at the time of trial. Each witness was throughly cross-examined regarding his identification.

In his defense, petitioner's primary witness was family friend Ms. Jewel Henderson. Ms. Henderson testified on direct examination that petitoner's hair was black in color on the night of the shooting. Even as Ms. Henderson testified, petitioner knew that he had told the police at the time of his arrest that his hair had been red on the night of the incident. Petitioner

was also aware that the statements concerning his red hair color were suppressed as fruits of an illegal arrest. Petitioner knew that his friend's testimony directly contradicted his suppressed statements.

The prosecution and the trial court were also aware of the contradiction, and in rebuttal, the prosecution was allowed to introduce petitioner's statements into evidence in order to rebut Ms. Henderson's testimony concerning petitioner's hair color on the night of the incident.

The Illinois Supreme Court upheld the trial court's ruling and announced a narrow exception to the exclusionary rule which would allow the use of suppressed evidence to impeach the direct testimony of a defense witness, which "squarely contradicts" the suppressed evidence. In reaching its decisions the state court relied on this Court's decisions in Walder v. United States, 347 U.S. 62, 98 L.Ed 503, 74 S.Ct. 354 (1954); Harris v. New York, 401 U.S. 222, 28 L.Ed.2d 1, 91 S.Ct. 643 (1971); United States v. Havens, 446 U.S. 620, 64 L.Ed 2d 559, 100 S.Ct. 1912 (1980).

In Walder, this Court first espoused the "impeachment exception" to the exclusionary rule. Defendant, charged with buying and selling narcotics, testified on direct examination that he had never been involved with the sale or possession of narcotics in any way. At the time of his testimony, defendant knew that his earlier charge of delivering heroin had been dismissed based on the suppression of illegally obtained evidence. 347 U.S. at 62-63, 98 L.Ed.2d at 506, 94, S.Ct. at 355.

After defendant's testimony, the prosecution was allowed to introduce rebuttal evidence of defendant's prior arrest for heroin for the sole purpose of impeaching defendant's credibility. While acknowledging the prohibitions of the

exclusionary rule, this Court upheld the admission of the suppressed evidence. Mr. Justice Frankfurter wrote:

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Goverment's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the Weeks doctrine would be a perversion of the Fourth Amendment. 347 U.S. at 65, 98 L.Ed. at 507, 74 S.Ct. at 356.

This Court expanded the impeachment exception in Harris v. New York, where defendant's testimony on direct and cross-examination "contrasted sharply" with the inculpatory statements made to police shortly after his arrest. 401 U.S. 222, 28 L.Ed.2d 1, 91 S.Ct. 643 (1971). This Court determined that although defendant's post-arrest statements were suppressed because of a Miranda violation and those statements had a direct bearing on the case at trial, the admission of the statements for impeachment purposes was proper. 401 U.S. at 225, 28 L.Ed.2d at 4, 915 S.Ct. at 645. While the Walder holding was limited to impeachment of defendant on collateral matters brought out in defendant's direct testimony, the Harris Court stated, "we are not persuaded that there is a difference in principle that warrants a result different from that reached by the Court in Walder." Id.

More recently the principles set forth in both Walder and Harris were relied on and expanded by this Court in United States v. Havens, 446 U.S. 620, 64 L.Ed.2d 559, 100 S.Ct. 1912 (1980). In Havens, this Court held that the Government's impeachment of defendant's testimony on cross-examination with suppressed evidence did not violate defendant's constitutional rights. 446 U.S. at 629, 64 L.Ed.2d at 566, 100 S.Ct. 1917. The fact that the Havens court upheld the impeachment of defendant's testimony brought out on cross-examination with suppressed evidence, indicates this Court's unwillingness to allow the abuse of the exclusionary rule as a shield for perjury.

Mr. Justice White wrote:

> We also think that the policies of the exclusionary rule no more bar impeachment here than they did in Walder, Harris, and Hass. In those cases, the ends of the exclusionary rules were thought adequately implemented by denying the government the use of the challenged evidence to make out its case in chief. The incremental furthering of those ends by forbidding impeachment of the defendant who testifies was deemed insufficient to permit or require that false testimony go unchallenged, with the resulting impairment of the integrity of the factfinding goals of the criminal trial. We reaffirm this assessment of the competing interests,. . . 446 U.S. at 627-28, 64 L.Ed.2d 566, 100 S.Ct. at 1916-17.

The Illinois Supreme Court thoroughly reviewed and relied on the Walder, Harris and Havens decisions to affirm the admission of the suppressed evidence in the present case. The factual situations presented in the above three cases are similar to that in the instant case: evidence was suppressed based on a fourth or fifth amendment violation; defense presented testimony which squarely contradicted the suppressed evidence; and the trial court allowed the suppressed evidence to be presented for impeachment purposes. The main factual distinction from this Court's line of decisions is that it was not petitioner but one of his witnesses who testified in contradiction of the suppressed statement.

Petitioner argues that this distinction takes his case out of the realm of the "impeachment exception" cases. For petitioner's argument to have merit, this Court must rule that a defendant is not responsible for evidence produced in his defense unless it comes from his own mouth. The Illinois Supreme Court rejected this argument, stating:

> In our view, if a defendant is prohibited from using perjury by way of a defense it matters not from whose lips that perjury comes. Just as a defendant may not directly perjure himself and then hide behind the exclusionary rule, he also cannot be allowed to use perjurious testimony through a biased defense witness, in this case, the principal defense witness, without affording the prosecution an opportunity to challenge the veracity of that testimony. 123 Ill. 3d 523, 536.

The state court also disagreed with petitioner's claim that the expansion of the impeachment exception would have a detrimental effect on the exclusionary rule. The petitioner claims that police and prosecutors will no longer be deterred from violating constitutional rights in obtaining evidence. Petitioner further contends that the rule announced by the Illinois Supreme Court would allow the prosecution to use the tainted evidence to "impeach the testimony of any witness a defendant might call." (Petitioner Br. 11)

On the contrary, the Illinois Supreme Court emphasized in careful detail the limited circumstances in which its ruling would apply. The use of suppressed evidence to rebut testimony of defense witnesses will be allowed only as to statements made by the witness on direct examination, which amounts to a clear contradiction of defendant's suppressed statements. "It must be apparent that the testimony of the witness, if false, has been purposely presented by the defendant." 123 Ill. 3d 523, 537. The court further emphasized that the exception does not apply to any part of a suppressed statement which could be characterized as a confession. Id.

In 1983, the Illinois Court looked to this Court's decisions in Walder and Havens and upheld the admission of suppressed evidence to correct a misimpression created by the defense's cross-examination of a prosecution witness. People v. Payne, 98 Ill. 2d 45, 456 N.E.2d 44 (1983). In Payne, defense counsel cross-examined one of the arresting officers on whether the defendant's apartment had been searched. The officer answered affirmatively and then defense counsel concluded his questioning. The jury was left with the false impression that the search had been fruitless when in fact the fruits of the search had been suppressed. Id. at 49, 509. In upholding the

admission of the suppressed evidence the Illinois court reasoned:

> If a defendant procures, invites or acquiesces in the admission of evidence, even though it be improper, he cannot complain. 98 Ill. 2d at 50.

The direction shown by Walden, Harris, Havens, and their progeny is clear: this Court will not allow the defense or prosecution to misrepresent the actual facts of a case under the protection of the exclusionary rule.

The petitioner also points to the cases of State v. Burnett, 637 S.W.2d 680 (Mo. 1982) State v. Hubbard, 103 Wash.2d 570, 693 P.2d 718 (1985), and United States v. Hinckley, 672 F.2d 115 (D.C. Cir. 1982), to support his contentions. All three cases are distinguishable from the case at hand.

In State v. Burnett, the defendant did not testify, but the prosecution's questions of defense witness on cross examination made reference to the suppressed evidence. The Supreme Court of Missouri held that if Havens was applicable to witnesses other than defendant, the outcome of Burnett would be the same because of the prosecution's scheme to set up the admission of the suppressed evidence on cross-examination. 637 S.W.2d 680, 690 (Mo. 1982).

In a 6 to 3 decision, the Washington Supreme Court reversed a lower court ruling that statements obtained in violation of Miranda can be admitted as substantive evidence to rebut testimony given by any defense witness. State v. Hubbard, 103 Wash. 2d 570, 693 P.2d 718, 720 (1985). If such a ruling were appealed to the Illinois Supreme Court, it would surely be

reversed in light of the instant case, which holds that the admission of suppressed evidence for impeachment purposes will only be permitted under the most limited circumstances.

The government's argument in United States v. Hinckley 672 F.2d 115 (D.C.Cir. 1982), was that insanity is an affirmative defense, not part of the prosecution's case-in-chief, and therefore defendant's statements, procured in violation of Miranda, can be used in rebuttal without jeopardising constitutional principles. The government also argued that if the defense puts forth testimony by an expert witness on the defendant's mental state, that testimony is tantamount to the defendant taking the stand himself. The Hinckley court rejected the government's theories. 672 F.2d at 132-134.

Clearly the ruling of the Illinois Supreme Court, in the instant case, would not support such a broad, all-encompassing argument. The Illinois court applied the principles set forth by this Court in Walden, Harris and Havens and its own decision of People v. Payne to the facts of the instant case to reach its decision to narrowly expand the impeachment exception.

The Illinois Supreme Court's holding preserves the deterrent ends of the exclusionary rule by denying the prosecution the use of suppressed evidence to make its case-in-chief and also preventing the affirmative exploitation of the suppressed evidence by the defense. Petitioner's argument fails to show a need for this Court in its sound discretion to grant his petition. The ruling of the Illinois Supreme Court is novel, but based on a clear line of decisions by this Court. Therefore this case does not warrant this Court to review the Illinois Supreme Court's decision.

CONCLUSION

The People of the State of Illinois respectfully request this Honorable Court to deny the petition for writ of certiorari in the above matter.

Respectfully submitted,

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